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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 566

WARD TRANSPORT, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered on November 1, 1954, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, dismissing a complaint seeking to set aside a Com-

mission order. The contested order approved establishment of rail rates, lower than the corresponding motor carrier rates, for transportation of refined petroleum products between points in Western Trunk Line Territory for distances of over 75 miles.

The Commission's order grew out of tariffs filed by ten railroads, to become effective October 1, 1950, providing for a reduction in their interstate rates for transporting petroleum products in tank-car loads from refineries and pipeline terminals in Colorado and Wyoming to destinations in these States and in western Kansas, Nebraska, and South Dakota. The proposed rates were generally about 1.5 cents per 100 pounds below the then prevailing tank-truck and rail, tank-car rates from and to the same points. On protest by appellants—motor carriers operating in competition with the railroads—the Commission, acting under Section 15(7) of the Interstate Commerce (49 U. S. C. 15(7)), suspended the proposed rates and scheduled a hearing to determine their lawfulness.*

After full administrative proceedings, in which appellants participated, the Commission found that the railroads were at a competitive disadvantage under the existing equal rates; that the proposed differential between rail and truck rates was not greater than required to redress the disadvantage; that the lower rates were compensatory for hauls over 75 miles, but not compensatory for

* The railroads voluntarily suspended the effective date of the tariffs beyond the 7-month period provided for in the Act. 49 U.S.C. 15(7).

shorter distances; and that approval of the lower rates for the longer distances would preserve the inherent advantage of rail transportation found to exist over such distances, while disapproval of the lower rates for shorter hauls would preserve the inherent advantage of motor carriers found to exist for such distances. *Petroleum from Colorado and Wyoming to Western Trunkline Territory*, 289 I. C. C. 457, 465-466.

On appeal, the district court unanimously sustained the Commission's order. The court held that the order had the support of adequate findings, which in turn were "supported by substantial evidence", and that the Commission's decision is not "arbitrary or capricious" or "contrary to law" (Juris. Statement 25-26).

We submit that the court's conclusions are plainly correct, and that this appeal presents no question of substance warranting further review by this Court.

1. Appellant contends (Juris. Statement 2-3, 9-11) that the Commission's findings that the lower rates would be compensatory for hauls of over 75 miles was not based on substantial evidence because the railroads did not introduce evidence showing their operating costs on the particular traffic involved. But the district court noted that the statistical evidence before the Commission showed that, for distances over 75 miles, the proposed rates would yield revenues substantially double the operating costs of the defendant railroads on their overall traffic. The court held that this evidence adequately supports the Commission's finding that the

proposed rates would yield revenue in excess of operating costs and would be compensatory and that, in view of this evidence, "a detailed cost analysis" was not requisite to the validity of the finding. The court also called attention to the fact that there was direct testimonial evidence that the reduced rates would be compensatory (Juris. Statement 24-25).

Illinois Commerce Commission v. *United States*, 292 U. S. 474, presented the question whether an order of the Interstate Commerce Commission, issued in 1933, should be set aside because the Commission had relied on a 1926-1927 cost study and had declined to make a new study to reflect alleged changed conditions. This Court, in affirming the Commission's order, said (p. 481):

> Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. * * * As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts.

Appellants cite *Northern Pacific Railway Co.* v. *Department of Public Works*, 268 U.S. 39, as holding that average cost figures may not be employed in determining point-to-point costs in rate hearings. But the situation which was there considered is very different from the present one. In the *Northern Pacific* case the average figure on which the

rate-making body had relied represented a composite average of the operating costs of four railroad systems, and this composite figure was made the basis of decision in the face of "fairly specific, direct, and comprehensive" evidence presented by the railroads as to their operating costs on the particular traffic involved in the rate proceeding. 268 U. S. 39, 43-44.

The district court also noted that the fact that the proposed lower rail rate was compensatory over the longer distances, taken with the motor carriers' own evidence that their costs for distances over 75 miles were higher than the existing rail and truck rates, was ample to demonstrate the inherent advantage of rail transportation for the longer distances, and thus to support the Commission's conclusion on this point (Juris. Statement 24).

2. Appellants urge that the Commission failed to make necessary findings as to the adverse effect of the differential rate on motor carriers and their operations as part of the national transportation system (Juris. Statement 3, 11-12). However, it is settled that the Commission need not make detailed findings of fact in non-damage cases, so long as the "essential basis of its judgment is sufficiently disclosed in its report." *Alabama Great Southern Railroad Co.* v. *United States,* 340 U. S. 216, 228. Here the Commission's action was aimed at striking a balance between two forms of transportation so closely competitive that any favorable effect as to one necessarily meant adverse effect as to the other. As the district court states, "the Commission by its positive findings impliedly made

the negative findings which the truck companies insist should have been made" (Juris. Statement 25). And, unlike the report of the Commission reviewed in *Cantlay and Tanzola, Inc.* v. *United States,* 115 F. Supp. 72 (S. D. Calif.), which appellants cite (Juris. Statement 12), its report here shows that the Commission considered the national transportation policy declared in the Interstate Commerce Act, and disapproved lower rail rates for the shorter hauls in order to preserve, in accordance with the policy so declared, "the inherent advantages" of truck transportation respecting such hauls (Juris. Statement 43).

3. Appellants question whether the Commission's findings (Juris. Statement 42) that the respondent railroads "cannot successfully compete wtih the motor carriers at equal rates, and that [for the longer hauls] the proposed rates are not lower than necessary to meet the truck competition" are supported by substantial evidence (*idem* 3-4, 13-14). But it is the weighing of conflicting evidence requiring expert judgment that is the special function of the Commission, *New England Divisions Case,* 261 U. S. 184, 203-204, and the district court, reviewing "undisputed evidence" as to the changes which have occurred in recent years in the relative amounts of petroleum traffic handled by rail and by truck (*idem* 22-23), concluded that the "record and evidence abundantly justify the finding of the Commission that in the movements here involved the railroads cannot compete with the tank-truck carriers on a parity of rates" (*idem* 22).

4. Appellants also contend that the Commission, in referring to reports in similar proceedings involving competitive rates between rail and truck carriers in other areas, thereby treated the records in such proceedings as evidence in support of its present findings. The court below held that the Commission's "findings demonstrate that the factual basis for its order was the record before the Commission in the present case," and the court, citing *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 529, held that the Commission "had the right to refer to experience in other cases as a guide for the application of its expert knowledge in a particular case" (Juris. Statement 26).

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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FEBRUARY, 1955.

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